IN THE U.S. NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON, D.C.

BEFORE

C.L. CARVER **D.A. WAGNER** **R.W. REDCLIFF**

UNITED STATES

v.

Robert L. EZELLE
Lieutenant Commander (O-4), Supply Corps, U.S. Navy

NMCCA 200301560 Decided 29 November 2004

Sentence adjudged 18 October 2002. Military Judge: J.V. Garaffa. Review pursuant to Article 66(c), UCMJ, of convened by Commander, Submarine Group TEN, Kings Bay, GA.

Capt ROLANDO SANCHEZ, USMC, Appellate Defense Counsel
Capt WILBUR LEE, USMC, Appellate Government Counsel

WAGNER, Judge:

A military judge, sitting as a general court-martial, convicted the appellant, pursuant to his pleas, of conspiracy to receive stolen property, conspiracy to steal military property, dereliction of duty through neglect, failure to obey a lawful general regulation, false official statement, wrongful disposal of military property through neglect, larceny of military property (5 specifications), wrongful appropriation of military property, receipt of stolen property (2 specifications), and fraternization (2 specifications), in violation of Articles 81, 92, 107, 108, 121, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 881, 892, 907, 908, 921, and 934. The appellant was sentenced to a dismissal and confinement for 5 years. The pretrial agreement had no effect on the sentence. The convening authority approved the sentence as adjudged.

The appellant presents four allegations of error for our consideration:

(1) The appellant's plea to Additional Charge I, Specification 1, was improvident because:

(a) the wrongful disposition of military property was not proximately caused by the appellant's omission of duty; and

(b) the military judge failed to ascertain whether the property was actually wrongfully disposed of or merely misplaced and later found.

(2) The appellant's sentence was inappropriately severe when compared to sentences imposed in closely related cases.

(3) The convening authority should be disqualified from acting on the appellant's court-martial because he has shown more than an official interest in the case.

(4) The military judge committed plain error by not dismissing Charge II and its Specification and Additional Charge I, Specification 1, as multiplicious because they both allege the same failure to perform a duty or, alternatively, that they constitute an unreasonable multiplication of charges.

After carefully considering the record of trial, the appellant's assignments of error[1], and the Government's response, we agree that the Specification under Charge II and Specification 1 of Additional Charge I are multiplicious. We also note that the providence inquiry failed to adequately establish facts sufficient to support the aggravating value element in Specification 1 of Additional Charge I. We will take corrective action in our decretal paragraph. Arts. 59(a) and 66(c), UCMJ.

Facts

The appellant assumed duties as supply officer assigned to Commander, Submarine Group TEN, Submarine Base Kings Bay, Georgia, in March of 2000. In addition to supply procurement and budget management for the immediate staff, the appellant also was responsible for oversight of two squadron supply departments and twenty submarine supply departments. In total, the appellant controlled a fiscal year budget of $1.484 million.

In May of 2001, the appellant purchased a bar in Macon, Georgia. He employed an enlisted member from his command, Mess Management Specialist Third Class [MS3] Jason R. Duff, USN, to perform construction work in the bar in exchange for cash, free alcoholic beverages, and a paid hotel room. In September of 2001, MS3 Duff began providing the appellant with supplies for the bar that were alleged to have come from another bar. The appellant realized after the first delivery that the supplies were government-issue, but nonetheless continued to accept, and pay for, additional deliveries of supplies from MS3 Duff. The appellant also used government funds to procure other supplies and equipment for the bar.

[1] We have considered the appellant's request for oral argument received on 5 October 2004 and that request is denied.

The appellant took a frozen drink machine from the flag mess at his command to the bar and used it in the bar. In January of 2002, the appellant purchased two autofryers with government funds and traded one to another bar owner for supplies and equipment. He kept the other for use in his bar. The appellant also used other enlisted members at the command to assist him with his commercial venture.

The appellant was aware of Department of Defense directives requiring that he maintain a controlled equipage program to prevent theft, misuse, or loss of highly pilferable government equipment. There was no operable system in place when the appellant took over as supply officer and he did not initiate one. Due to the lack of controls, procurement fraud and theft was rampant in the Supply Department. A later investigation documented over $200,000.00 in lost or stolen equipment in the previous several years, including the appellant's tenure as supply officer.

Providence of Guilty Plea to Additional Charge I, Specification 1

In his first assignment of error, the appellant contends that the military judge erred by accepting his plea of guilty to the charged offense of wrongful disposition of military property through neglect. We find the plea to be provident except for the aggravating element of value.

Before accepting a guilty plea, the military judge must determine, through inquiry of the accused, facts sufficient to satisfy every element of the offense. Art. 45 (a), UCMJ; *United States v. Care*, 40 C.M.R. 247 (C.M.A. 1969); RULE FOR COURT-MARTIAL 910(e), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.). The military judge has broad discretion in determining that the plea has a factual basis. *United States v. Roane*, 43 M.J. 93, 94 (C.A.A.F. 1995). Rejection of such a guilty plea on appellate review requires that the record of trial show a substantial basis in law and fact for questioning the guilty plea. *United States v. Jordan*, 57 M.J. 236, 238 (C.A.A.F. 2002)(citing *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991)).

The appellant advances two arguments to support his claim that his plea was improvident. In the first instance, the appellant states that the wrongful disposition of military property was not caused by his omission of duty. Second, the appellant argues that it cannot be ascertained from the record whether the property in question was actually disposed of or misplaced and later found.

The elements of wrongful disposition of military property, as they pertain to this appellant, are as follows:

that certain property was lost or wrongfully disposed of;

that the property was military property of the United States;

that the loss or wrongful disposition was suffered by the appellant, without proper authority, through a certain omission of duty by the appellant;

that the omission was negligent; and

that the property was of a value of more than $500.00.

MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.), Part IV, ¶ 32(b)(3). Implicit in the element involving negligence is the requirement that the appellant's negligence be the proximate cause of the loss or wrongful disposition of the property. *United States v. Donnelly,* 19 C.M.R. 549, 551 (N.B.R. 1955). In this case, it is not an action on the part of the appellant, but an omission of duty, that is alleged as the culpable negligence. Where such a duty does exist, it must be established by the appellant during the providence inquiry. *United States v. Fuller,* 25 M.J. 514, 516 (A.C.M.R. 1987).

The appellant stated during the providence inquiry that he was required, as the supply officer, to maintain a controlled equipage program to account for high-value, small, easily pilferable items. The appellant acknowledged that he knew of this duty and that he failed to maintain such a program. The appellant also acknowledged that, as a direct result of his failure to maintain a controlled equipage program, military property was purchased without legitimate need and was lost from the possession of the United States without any accountability. The appellant stated that some of the $200,900.00 in military property had been recovered, but that the lack of record keeping prevented proper identification of where each item was to go. He also stated that some of the property in question should have been tracked by the Automated Data Processing (ADP) Department, but he knew that ADP was not tracking it. The appellant stated that he sent a memo to ADP asking it to switch tracking for those items from his cognizance to theirs, but never received an answer. The appellant acknowledged that he remained responsible for control of the property until ADP affirmatively took that control from him, which never occurred. The appellant also stated that, although no controlled equipage program was in place when he assumed his duties, he had an affirmative duty to initiate one and was neglectful in failing to do so.

During pre-sentencing, Captain Edwin Victoriano, SC, USN, who had conducted a Manual of the Judge Advocate General investigation into the supply discrepancies, testified that transactions involving approximately $71,000.00 worth of the military property had occurred before the appellant assumed duties as supply officer. He added that the appellant found the Supply Department to be in disarray and did nothing to improve it.

Based on the clear and unambiguous statement of the appellant, he knew and understood that he had an affirmative duty to maintain a controlled equipage program to prevent loss or wrongful disposition of military property under his cognizance and that he failed to do so. His failure to execute this duty was the proximate cause of the loss or wrongful disposition of military property. The fact that the appellant's omission of duty was not the only causal factor in the loss or wrongful disposition of the military property does not negate that omission as a proximate cause. The question is whether the actions of others in abusing their purchase privileges under the supply system loomed so large in comparison with the appellant's negligence that the appellant's negligence could not be regarded as a substantial factor in the loss or wrongful disposition of military property. *United states v. Cooke,* 18 M.J. 152, 155 (C.M.A. 1984). In this case, but for the appellant's failure to properly execute his assigned duties, the military property would not have been lost or wrongfully disposed of by the criminal actions of others.

The appellant avers in his second argument in support of this allegation of error that it cannot be ascertained from the record whether the property in question was actually disposed of or misplaced and later found. This argument misstates the facts elicited during the providence inquiry. The appellant states only that some of the military property had been recovered and Captain Victoriano testified that approximately $71,000.00 of the $200,900.00 in military property was the result of transactions occurring before the appellant's tenure. There is no doubt, based on the appellant's statements during providence, that military property, of some value, was lost or wrongfully disposed of as the direct result of his culpable negligence.

There is considerable question, however, as to the actual value of the military property lost or wrongfully disposed of while the appellant was the supply officer. Therefore, that portion of the appellant's plea pertaining to the aggravating element that the military property was of a value greater than $500.00 was improvident.

With the exception of the aggravating element discussed above, we find that there is no substantial basis in law or fact for questioning the providence of the appellant’s guilty plea to wrongful disposition of military property.

Sentence Appropriateness and Disparity

The appellant contends that his sentence is inappropriately severe and disparate compared to the sentences in closely related companion cases and he requests that we, therefore, disapprove his dismissal and approve only three years of the adjudged confinement. We decline to grant the requested relief.

While the power to award clemency is reserved for the convening authority, we are charged to affirm only those sentences that we deem fair and just. *United States v. Cavallaro,* 14 C.M.R. 71, 74 (C.M.A. 1954). In the normal course of events, we must determine sentence appropriateness without regard to sentences in other cases. *United States v. Healy*, 26 M.J. 394 (C.M.A. 1988). This requires "'individualized consideration' of the particular accused 'on the basis of the nature and seriousness of the offense and character of the offender.'" *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982)(quoting *United States v. Mamaluy*, 27 C.M.R. 176, 180-81 (C.M.A. 1959)).

In closely related cases, however, we are required to afford relief where the sentences are "highly disparate." *United States v. Kelly,* 40 M.J. 558, 569 (N.M.C.M.R. 1994). Under the circumstances of this case, involving six service members charged with larceny and misuse of the government procurement system, we find that the cases are closely related. *See United States v. Lacy,* 50 M.J. 286 (C.A.A.F. 1999). The issue turns on whether the sentences are, in fact, highly disparate, and, if so, whether there are good and cogent reasons for the disparity. *See Kelly,* 40 M.J. at 570.

Looking first at sentence appropriateness, after reviewing the entire record, given the nature and seriousness of the offense, we do not find the adjudged sentence to be inappropriately severe and we will not substitute our judgment for that of the trial judge, who was present to see and hear all of the evidence, without good cause to do so. *Snelling*, 14 M.J. at 268. Granting sentence relief at this point would be to engage in clemency, a prerogative reserved for the convening authority. *Healy*, 26 M.J. at 395-96.

Turning next to the issue of sentence disparity, we have compared the sentences in each of the related cases. The appellant was a commissioned officer with over fifteen years of active duty service at the time he committed these crimes. He had been placed in a position of responsibility involving the accountability of millions of dollars and the supervision of many junior supply officers at subordinate commands. The other five service members were enlisted members, none above the pay grade E-6. Four of the other service members were tried by general courts-martial, with three receiving a bad-conduct discharge, reduction to pay grade E-1, and confinement periods ranging from 4 to 36 months. The record and brief do not reflect a sentence in the fourth general court-martial. The other service member received an Other Than Honorable Discharge in lieu of court-martial.

The court finds good and cogent reasons for any disparity in the sentences. The appellant was convicted of more offenses than any of the other similarly situated service members. Additionally, he was the officer charged with primary

responsibility for safeguarding the military property in question. He was the superior officer in the chain of command to some, if not all, of the other service members. Finally, the appellant's status as a commissioned officer, standing alone against the other service members status as enlisted members, can be sufficient to justify disparate sentences. *United States v. Moultak,* 24 M.J. 316, 318 (C.M.A. 1987).

We, therefore, decline to grant the requested sentence relief.

Disqualification of the Convening Authority

This allegation of error has been considered and is without merit. *United States v. Voorhees,* 50 M.J. 494 (C.A.A.F. 1999).

Multiplicity and Unreasonable Multiplication

In his final assignment of error, the appellant asserts that dereliction of duty is either multiplicious with wrongful disposition of military property or is an unreasonable multiplication of charges. The appellant requests that we disapprove the findings as to one or the other of these offenses and reassess the sentence. We agree that the offenses are multiplicious.

The trial defense counsel posed no objection to the allegation of wrongful disposition. Further, the appellant pled guilty to all offenses pursuant to a pretrial agreement. Multiplicity issues are waived by failure to object unless they rise to the level of plain error. *United States v. Britton*, 47 M.J. 195, 198 (1997). "[M]ultiplicity issues were waived by failure to make a timely motion and an unconditional plea of guilty, unless the offenses 'could be seen as facially duplicative,' that is, factually the same." *United States v. Ramsey*, 52 M.J. 322, 324 (2000)(citing *United States v. Lloyd*, 46 M.J. 19, 32 (1997)).

In the present case, the elements of the two offenses establish that they are facially duplicative as pled. On the one hand, the dereliction of duty offense required that the appellant had a certain duty, had knowledge of the duty, and, through neglect, was derelict in performing that duty. The wrongful disposition of military property offense, in part, required that the appellant had a certain duty, had knowledge of the duty, and, through neglect, omitted that duty. We can surmise no factual or legal difference between the two charges of failure to perform an assigned duty, except that one is a greater offense, with additional elements, and increased punishments. Accordingly, we will affirm only the finding of guilty to the greater offense.

Conclusion

The findings of guilty to Charge II and its sole supporting Specification (derelection of duty by neglect) are set aside and dismissed. The finding of guilty as to the aggravating element of over $500.00 in value in Specification 1 under (wrongful disposition of military property neglect) Additional Charge I is set aside and dismissed. The remaining findings of guilty, as approved below, are affirmed.

Upon reassessment of the adjudged sentence, we find that the sentence received by the appellant would not have been any lighter even if he had not been charged with the dismissed specification or aggravating factor. We further find that the sentence is appropriate for this offender and the remaining offenses. *See United States v. Peoples*, 29 M.J. 426, 428 (C.M.A. 1990); *United States v. Sales*, 22 M.J. 305, 307 (C.M.A. 1986); *United States v. Suzuki*, 20 M.J. 248, 249 (C.M.A. 1985).

Accordingly, the sentence, as approved by the convening authority, is affirmed.

Senior Judge CARVER and Judge REDCLIFF concur.

For the Court

R.H. TROIDL
Clerk of Court